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No. 85-1741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN MINING CONGRESS,
AMAX INC.,
ASARCO INCORPORATED,
ST. JOE MINERALS CORPORATION,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's ("EPA") brief in opposition ("Opp.") largely repeats and relies upon the errors of the court's decision below. It argues that EPA's revision of the proposed rules under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("Act") was insubstantial and one on which Petitioners had adequate notice and the opportunity to comment. It further contends that the decision of the United States Court of Appeals for the Fourth Circuit does not conflict with those of other circuits. Finally, EPA urges that the case is simply a factual dispute about the adequacy of notice and consequently raises no significant legal issues.

1. The Revision Was Substantial

EPA attempts to minimize the significance of the revision to its proposed rules by claiming that Petitioners' complaint is not directed to any change

in the effluent limitation standards, but to the "addition of a supplemental control technology" which industrial dischargers, such as Petitioners, are not required to adopt (Opp. p. 6). Such an argument is utterly disingenuous, in light of the Act's requirements that effluent limitations be "technology-based."[1] The statutory scheme contemplates the selection by EPA of an appropriate technology which will permit dischargers to attain the effluent standards being established.

In the instant case EPA proposed certain effluent standards, the achievability of which were to be based on the "lime precipitation, settle and filter treatment technology" (LS&F). Comments of Petitioners persuaded EPA that the standards being set were unachievable under the LS&F technology. It then adopted a new and different technology - sulfide precipitation - to support its proposed standards. Petitioners were denied the opportunity of addressing whether the standards were achievable under the sulfide precipitation technology.[2]

Since it is the technology that determines the final standards, any change in the technology obviously has a material impact upon the standards being proposed and constitutes a fundamental change in the proposed rules. It is true that the Act does not expressly direct a discharger to adopt a particular technology, but if no technology exists to support the standards, such

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[1] EPA notes correctly in its Opposition that under the Act, "Congress authorized EPA to establish *technology-based* effluent limitations and standards for categories of industrial dischargers" (Emphasis added) (Opp. p. 2).

[2] See Appendix pp. 40a-45a.

standards cannot be met;[3] and their adoption by the EPA is unlawful.

2. Petitioners Were Not On Notice That A Technology Other Than Those Specified In The Federal Register Was Under Consideration

EPA does not dispute the fact that the sulfide precipitation technology was not one of those specifically identified in the Federal Register as being relied upon for the proposed rules and upon which public comments were sought. Instead, it argues that since the Federal Register alerted the public that chemical precipitation, which includes sulfide precipitation, was under consideration and EPA sought comments on other effective treatment technologies, adequate notice had been given (Opp. p. 6). Chemical precipitation is far too general a term, including as it does many technologies,[4] to satisfy the "reasonable specificity" requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"). *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). Similarly, the general invitation to submit other proposals or technologies did not afford Petitioners the requisite notice that the specifically identified technologies would be changed to sulfide precipitation. *National Black Media Coali-*

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[3] This procedure, which violates the Clean Water Act, of selecting the limits before determining the proper technology was used by EPA in establishing all the 40 C.F.R. Part 421 Subpart E, G, H and I regulations. The Fourth Circuit refused to consider this issue which was raised by Petitioners in the court below. See Petition, p. 7, n. 7.

[4] Chemical precipitation was not included in the Federal Register list of six technologies being considered by EPA in this rulemaking. See 48 Fed. Reg. 7047 (1983).

tion v. *Federal Communications Commission*, 791 F.2d 1016, 1022-1023 (2nd Cir. 1986). And the lack of notice is emphasized by the absence in the voluminous comments of any suggestions that sulfide precipitation should be considered as an alternative treatment technology. *PPG Industries, Inc.* v. *Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981).

EPA relies heavily upon its discussion of sulfide precipitation in the draft Development Document accompanying the proposed rules as satisfaction of the notice requirements of the APA (Opp. pp. 6-7). If sulfide precipitation were so important and reliable a technology as EPA now attempts to portray, why was it not identified as being one of the six technologies specifically listed in the Federal Register as being considered under the proposed rule? Its absence from the proposed rule and the specifically identified list of six technologies, like that of twenty other technologies discussed in the 2100 page Development Document, clearly caused Petitioners to believe that it was not regarded by EPA as one of the technologies upon which effluent standards would be based.

EPA suggests that even if sulfide precipitation were not specifically identified in the proposed rule published in the Federal Register, Petitioners' comments on the draft Development Document reveal they were on actual notice of sulfide precipitation as a possible alternative technology (Opp. p. 7). Petitioners' comments, however, were *limited* to the draft Development Document's discussion of the *six technologies* identified in the proposed rule. The limited nature of Petitioners' comments highlight their lack of actual notice and why a Development Document is not a

substitute for notice in the Federal Register.

3. Petitioners Were Denied The Opportunity To Challenge EPA's Final Choice Of A Technology

EPA contends that Petitioners were not denied an opportunity to challenge EPA's adoption of sulfide precipitation as a technology since the court of appeals considered their objections to that control method (Opp. p. 8). EPA's argument places the cart before the horse. It is the agency with its expertise, and not a reviewing court that must first consider and rule upon objections to a proposed regulation. Indeed, objections must first be raised with the agency before a court will even consider them. *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973). The statutory rulemaking scheme is predicated on the initial evaluation by the agency of public comments and objections. Without such an administrative record a reviewing court is not in a position to make a reasoned and informed judgment on agency action.

Not only did EPA refuse to permit Petitioners to comment upon the sulfide precipitation technology during the rulemaking process,[5] but it successfully opposed Petitioners' attempt to supplement the record and address such control method in their briefs to the court of appeals (App. pp. 52a; 55a-56a).[6] With-

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[5] When the final regulations were issued March 8, 1984, Petitioners had not received a copy of crucial analytical data from EPA. The information was not obtained until months after the regulations were issued, and then after a Freedom of Information Act request was filed (App. pp. 47a-49a).

[6] Petitioners sought to place before the court of appeals data from the same foreign plant relied upon by EPA which would

(*footnote continued*)

out the benefit of Petitioners' comments on sulfide precipitation before the EPA or the supplemental data they sought to bring to the court's attention, the court below was in no position to determine the reasonableness and legality of EPA's prescribed effluent standards.

4. The Decision Of The Court of Appeals Conflicts With Those Of Other Circuits And Its Own Prior Decision

EPA attempts to distinguish the cases cited by Petitioners which show that the decision below conflicts with decisions of other circuits and one of its own decisions.[7] The Agency argues that, unlike those decisions, the revision in issue here did not fundamentally alter the proposed rule. But as demonstrated above, EPA did in fact make a basic and substantial change in the rule by adopting a technology that was never subject to notice and comment.

EPA also claims that notice of sulfide precipitation was not supplied by a comment, but by notice in the Federal Register and draft Development Document, and thus its adoption as a technology was a "logical outgrowth" of the original proposal. However, as noted above sulfide precipitation was not identified as one of the technologies under consideration in the Federal Register; and reference to a large number of

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demonstrate that sulfide precipitation could not achieve the prescribed standards. They were also prepared to show that EPA had been informed during the rulemaking that the samples at the foreign plant were not representative of long-term performance.

[7] *American Federation of Labor and Congress of Industrial Organizations* v. *Donovan*, 757 F.2d 330 (D.C. Cir. 1985) and *Chocolate Manufacturers Ass'n.* v. *Block*, 755 F.2d 1098 (4th Cir. 1985).

additional technologies in a draft Development Document without any indication they were being considered as possible alternative control methods does not meet the requirements of the APA.

Furthermore, while the comments did not mention sulfide precipitation - a clear indication of lack of notice to Petitioners - they clearly did trigger EPA's adoption of a seventh and new technology, as both the court below found (App. p. 15a) and EPA concedes (Opp. p. 9). If courts do not allow agencies to escape the notice requirements of the APA by basing a revised rule on the substantive contents of comments, then *a fortiori* an agency cannot claim notice where the comments do not even discuss the technology subsequently adopted, but cause the agency to take different action than initially proposed.

In addition to the cases cited in the Petition for Writ of Certiorari, the decision below is also in conflict with a more recent decision of the Second Circuit - *National Black Media Coalition et al.* v. *Federal Communications Commission*, 791 F.2d 1016 (2nd Cir. 1986). There, in circumstances very similar to those here, the court held that an invitation to "submit other proposals" and "the comments of other interested parties" did not provide adequate notice when the final rule differed significantly from the proposed rule, and was based on information not available to the public (*id.* at 1022-1023).

5. The Petition Raises Significant Legal Issues

EPA attempts to dismiss this case as one involving only a factual dispute on the adequacy of notice and not any significant legal issues. The issues in this

case, however, transcend the particulars of the rulemaking proceeding under challenge, for they raise the recurring question of what obligation an agency has under Section 4 of the APA to give notice and opportunity for comment on a rule that substantially differs from what was originally proposed. The question "will ultimately require interpretation of important statutory language by this Court" *Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096, 1098 (1980) (Rehnquist, J., dissenting). And the question is an especially important one in the Environmental Law area where the statutory schemes rely heavily upon meaningful participation in rulemaking proceedings and usually provide little or no opportunity for adjudicatory hearings, *e.g.* Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, and Safe Drinking Water Act, 42 U.S.C. §§ 300 F *et seq.*

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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